IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-6089
Non-Argument Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

RICHARD HOWARD EHLINGER,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

(September 23, 1982)

Before GODBOLD, Chief Judge, FAY and CLARK, Circuit Judges.

PER CURIAM:

Richard Howard Ehlinger appeals his conviction of possession with intent to distribute marijuana and conspiracy to possess marijuana with intent to distribute in violation of 21 U.S.C. §846. We have examined Ehlinger's contentions and have found them to be without merit. Therefore, we affirm his conviction.

Ehlinger contends that the trial court erred in failing to grant his motion for a judgment of acquittal on the grounds there was insufficient evidence to sustain

his conviction for conspiracy and the possession of a controlled substance. Ehlinger's contention must, however, fail. Under *Glasser u United States*, 361 U.S. 60 (1942), this court is charged with viewing the evidence and all inferences that may reasonably be drawn from it in the light most favorable to the government. When the evidence is viewed in this manner, it is sufficient to support Ehlinger's conviction.

On January 9, 1981, special agents of the Drug Enforcement Administration sought to purchase marijuana from a group of individuals. These agents initially met with one of Ehlinger's co-defendants, Gerald Todd. It was arranged that the agents would purchase 28,000 pounds of marijuana at $250 per pound. While these negotiations were taking place, Todd made a number of phone calls. During the course of the negotiations, a Cadillac driven by one of Ehlinger's co-defendants, Eugene Fox, pulled up. Ehlinger was a passenger in the car. The appellant was present when Fox informed the agents that a load of fourteen tons of marijuana was en route. The appellant later made calculations computing the price that the agents were to pay for the marijuana. He also explained to the agents the location of seven bales of marijuana and announced that their price was $74,000.

Soon afterward, a van full of marijuana pulled up. Ehlinger, after some discussion, drove the van to a truck and helped unload the marijuana. He also conducted an inventory of the marijuana, checking the bale numbers against the weight of the individual bales.

Under these facts, the jury could have found the evidence sufficient to convict Ehlinger. Consequently, we reject Ehlinger's contentions on this point.

The appellant also argues that the trial court abused its discretion in failing to grant his motion for a continuance because of his injuries. Motions for continuance are addressed to the sound discretion of the court. This discretion is not disturbed on appeal unless there is a clear showing of abuse of discretion. *See, e.g., United States v. Nickerson*, 669 F.2d 1016 (5th Cir. 1982); *United States v. Harbin*, 601 F.2d 773 (5th Cir.), *cert. denied*, 444 U.S. 954 (1979).

The court below did not abuse its discretion. The trial judge inquired as to whether the defendant's mind was clear and he responded affirmatively. Further, when informed that the defendant could only sit for an hour without suffering pain, the trial judge announced that the trial would be in hour-long segments, followed by recesses. Neither appellant nor his counsel complained of appellant's discomfort during the trial. Nor did appellant present any evidence that the drugs he was taking affected his thinking or his ability to assist his counsel before or during trial. Thus, we find that Ehlinger's contention is meritless.

Lastly, Ehlinger contends that the trial court erred in failing to grant his motion for a mistrial due to a prosecutorial comment on his silence. Specifically, the following prosecutorial statement during closing argument is complained of:

He makes a big deal about where that came from, the saying that it was incorrect in his report. The question was, "Isn't it a fact that you submitted a report that it was found in his pocket, but it was found in a container?"

There is absolutely no contention that the container didn't belong to Mr. Ehlinger.

(Record, at 217.)

"Prosecutorial reference to the 'uncontradicted' state of evidence constitutes impermissible comment of the defendant's exercise of the right to remain silent only if: (1) the prosecutor's manifest intention was to comment on the defendant's failure to testify, or (2) the remark was such that the jury would naturally and necessarily take it to be a comment on the failure of the defendant to testify." *Williams v. Wainwright*, 673 F.2d 1182, 1184 (11th Cir. 1982). Under *Williams*, if a plausible explanation for the prosecutorial comment other than pointing out the defendant's failure to testify is present, the first part of the test is satisfied. In the instant case, the disputed remark was merely a reference to the fact that although where a certain document was found was disputed, it was undisputed that it was under Ehlinger's control. Thus, the appellant fails on the first prong of the *Williams* test.

Secondly, from examining the record, we find that the jury would not "naturally and necessarily" take the reference to be a comment on the accused's silence. Therefore, Ehlinger has failed to carry the day on the second point of the *Williams* test.

We have examined all of Ehlinger's contentions and have found them to be meritless. Consequently, the affirmation of his conviction is required.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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D. C. Docket No. 81-6007-CR-NCR

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

RICHARD HOWARD EHLINGER,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

Before GODBOLD, Chief Judge, FAY and CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 23;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of conviction of the said District Court in this cause be and the same is hereby AFFIRMED.

September 23, 1982